No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 65a-95a) is reported at 445 F. Supp. 1128.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. A petition for rehearing was denied on March 22, 1979 (Pet. App. 62a-64a). The petition for a writ of certiorari was filed on April 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Commerce may relieve a vessel that has received and repaid a federal construction subsidy of the trade restrictions imposed by Section 506 of the Merchant Marine Act.

STATEMENT

1. In 1972 petitioner Seatrain Shipbuilding Corporation began constructing the T. T. STUYVESANT, a 225,000 deadweight ton oil tanker, with the aid of a $27.2 million construction-differential subsidy ("CDS") from the federal government. See Title V of the Merchant Marine Act of 1936 ("the Act"), 46 U.S.C. 1151-1161.[1] In accordance with Section 506 of the Act, 46 U.S.C. 1156, petitioners promised (as a condition of receiving the CDS) to operate the STUYVESANT in the foreign rather than the domestic trade.[2] Unfortunately, by the time the STUYVESANT

[1] Petitioner Seatrain and its corporate affiliate, petitioner Polk Tanker Corporation (the owner of the STUYVESANT) received additional federal financial aid: pursuant to Title XI of the Act, 46 U.S.C. 1271-1280, the government guaranteed $30.2 in construction loans for the STUYVESANT itself; the Economic Development Administration of the Department of Commerce ("EDA") had loaned petitioners $5 million and given 90% guarantees on another $82 million in loans in order to make possible Seatrain's conversion of the old Brooklyn (New York) Navy Yard into a civilian shipbuilding facility (Pet. App. 8a-9a, 69a).

[2] "Foreign trade" means trade between a foreign port and an American port. "Domestic trade" means trade between American ports. See *American Maritime Association* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). See also 46 U.S.C. 883. CDS money is unavailable to ships operating in the domestic trade. See *id.* at 1151(a), 1156.

was completed in 1977, no market existed for the STUYVESANT in the foreign trade, and there is no prospect for gainful employment in that trade for the foreseeable future.[3] There is a demand, however, for the services of the STUYVESANT in the Alaskan oil trade. In June 1977 the Standard Oil Company of Ohio (SOHIO) contracted with petitioner Polk for a three-year charter of the STUYVESANT for operations in the Alaskan trade (Pet. App. 8a-10a, 69-70a).

Because the STUYVESANT had received a CDS, Section 506 precluded it from operating in the domestic trade for more than six months in any year. See 46 U.S.C. 1156.[4] But it is not economical to operate the STUYVESANT for only six months per year, and the SOHIO contract was dependent on petitioner's arranging for the STUYVESANT to operate in the domestic trade for the entire three years. Accordingly, in August 1977 petitioners filed an application with the Assistant Secretary of Commerce for Maritime

[3] The low oil prices and high demand of the 1960s and early 1970s spurred a world-wide flurry of oil tanker building. Reductions in demand below what was expected meant that there soon was excess capacity. Because they face higher construction and operating costs, American flag vessels are unable to compete with the surfeit of foreign vessels, despite the CDS and ODS (operating differential subsidy (see 46 U.S.C. 1171-1183a)) programs.

[4] The Secretary must authorize any such temporary transfer to the domestic trade.

Affairs and the Maritime Subsidy Board, requesting that the Secretary of Commerce accept full repayment of the STUYVESANT's CDS in exchange for the termination of the STUYVESANT's domestic trade limitations (Pet. App. 10a-11a, 70a).[5]

On August 31, 1977, the Secretary (through her designees) agreed to release the STUYVESANT permanently from its Section 506 restrictions on repayment in full of the CDS. The Secretary allowed petitioners to repay the CDS by a fully-secured 20-year interest-bearing note. The Secretary also approved the issuance and sale of $31 million worth of federally-guaranteed bonds as part of the STUYVESANT repayment, sale and charter transactions.[6] The Secretary found that her actions were warranted because (1) the STUYVESANT could be operated profitably only in the Alaskan trade, (2) the SOHIO charter, which was dependent on a termination of the CDS restrictions, would improve the security for debts owing to the government and prevent default on the government-guaranteed obligations, and (3) the economic vitality of Seatrain's Brooklyn Navy Yard operations, which are backed by substantial government guarantees, was inextricably linked to the profitable operation of the STUYVESANT (Pet. App. 11a, 70a-71a, 91a; R. 43).

[5] Previously petitioners had sought a three-year release in exchange for a pro rata repayment of the CDS (Pet. App. 10a-11a, 70a; R. 30-42). See 42 Fed. Reg. 37229 (1977). Petitioners withdrew this application in the face of objections by various shippers in the Alaskan trade.

[6] Petitioner Polk was to transfer title in the STUYVESANT to the United States Trust Company ("USTC") as trustee for the equity owner, the General Electric Credit Corporation ("GECC"). USTC was to assume both the note issued by petitioner Polk and the more than $60 million indebtedness on the STUYVESANT. (The $60 million included the $31 million in new bonds.) USTC used the bond proceeds to pay off $28 million in EDA-guaranteed loans and also paid Polk an additional $32.6 million, to be held in a special account as security for a guarantee by petitioner's parent to GECC. Finally, USTC chartered the STUYVESANT to Queensway Tankers, which in turn chartered it to SOHIO for three years.

2. On September 22, 1977, respondents Shell Oil Company, Alaska Bulk Carriers, Inc. and Trinidad Corporation ("the plaintiffs") filed suit in the United States District Court for the District of Columbia against various federal defendants.[7] The plaintiffs argued: (1) that the Secretary was without power to release the STUYVESANT from its Section 506 restrictions, (2) that, in any event, the Secretary had abused her discretion by failing to consider the competitive effects of these transactions, and (3) that the Secretary had not adhered to the procedures prescribed by the Administrative Procedure Act ("APA"), in violation of 5 U.S.C. 706(2)(D). The district court issued a temporary restraining order. On September 29, 1977, the court dissolved that or-

[7] The defendants were Secretary of Commerce Juanita Kreps, Assistant Secretary of Commerce Robert Blackwell, then Deputy Assistant Secretary of Commerce Howard Casey, then General Counsel to the Maritime Administration Samuel Nemirow, the Maritime Administration, and the Maritime Subsidy Board (Pet. App. 4a, 66a; R. 20-21, 53-54). The district court allowed petitioners to intervene as defendants (R. 88-90).

der and denied the plaintiffs' request for a preliminary injunction. The STUYVESANT transactions were closed the following day (Pet. App. 12a, 66a, 71a-72a; R. 18-86, 103-107).

Both sides then moved for summary judgment. The district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from its restrictions in exchange for repayment of the CDS. According to the district court, such power is inherent in the Secretary's broad contractual powers under Sections 207, 504, and 1104(a)(3) of the Act, 46 U.S.C. 1117, 1154, 1274(a)(3). The court further held, however, that the Secretary had abused her discretion in failing to analyze the economic effects of the STUYVESANT transactions on domestic carriers. Accordingly the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. Finally, the court denied the parties' cross-motions for summary judgment regarding the plaintiffs' APA claim, finding that material facts relating to it were in dispute (Pet. App. 65a-95a).

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss their APA claim and asked for entry of a "final order." On November 30, 1977, the district court granted this motion and entered a "final order," apparently relying on Fed. R. Civ. P. 54(b) (R. 246-247). While the Secretary was still conducting the proceedings on remand, the plaintiffs appealed from the district

court's holding that the Secretary has the authority to accept repayment and permit a ship to engage in the domestic trade.

Prior to oral argument in the court of appeals, the Secretary concluded that the transactions would have little or no adverse effect on the plaintiffs.[8] The Secretary therefore adhered to her prior decisions regarding the STUYVESANT.[9]

A divided panel of the court of appeals held that the Secretary cannot lift the STUYVESANT's domestic trade restrictions. The court rejected the Secretary's argument that her broad contractual powers under the Act supplied such authority, concluding that the six-month temporary waiver provision in Section 506 impliedly negated any authority to grant permanent releases (Pet. App. 1a-51a). Judge Bazelon dissented, arguing that the legislative history of Section 506 does not support the conclusion that Congress intended to preclude lifting the domestic trading restrictions (*id.* at 52a-61a).

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[8] The Secretary made detailed findings about the demand for tankers in the Alaskan market and concluded that demand would continue to exceed supply for the foreseeable future (R. 590-630).

[9] Plaintiff Shell filed a second suit in the district court challenging the Secretary's findings on remand. *Shell Oil Co.* v. *Kreps*, Civ. No. 78-1919 (D. D.C. Oct. 13, 1978). The district court dismissed that action without prejudice following the court of appeals' decision in this case.

DISCUSSION

This case involves a significant issue concerning the Secretary's power to administer the maritime construction subsidy program established by Congress in 1936. The Act carries out a long-standing federal policy—based on military, economic and political considerations—of subsidizing the construction of this country's overseas merchant marine fleet. See, *e.g.*, H.R. Rep. No. 1277, 74th Cong., 1st Sess. 1-4, 11-13 (1935). The court of appeals' holding that the Secretary cannot accept repayment of the subsidy and lift the Act's domestic trade restrictions undermines the purposes of the Act. It will cause an American flag vessel to be denied employment. At a time when there is insufficient capacity to carry Alaskan oil, an American vessel will be laid up. Moreover, by creating the risk that a vessel, once subsidized, will be denied available employment, the decision makes the CDS program less attractive to builders and owners, thus further undermining the statutory program.

Although the decision is one of first impression in the courts, it conflicts with an earlier decision by the Comptroller General.[10] There will never be a conflict among the circuits on the meaning of the Act: any person dissatisfied with the Secretary's decision to accept repayment of a CDS would file suit in the District of Columbia. And although the Secretary

[10] In 1964 the Comptroller General issued an opinion upholding the Secretary's power permanently to relieve a vessel of its Section 506 restrictions. Decision B-155039, 44 Comp. Gen. 180 (1964) (the Grace Line decision).

has entered into a transaction equivalent to that underlying this case on only one prior occasion, she believes that her ability to arrange such transactions in appropriate circumstances may be of substantial importance.[11] If there were not a jurisdictional defect in this case, we would urge the Court to grant plenary review. There is a substantial jurisdictional problem, however, and we therefore urge the Court to grant the petition and to vacate the decision.

1. 28 U.S.C. 1291 permits courts of appeals to review "final decisions" of district courts. The finality rule reflects a strong congressional policy against piecemeal review. *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Accordingly, an order rejecting plaintiffs' view of Section 506, but remanding this case to the Secretary for further proceedings, is not appealable. See, *e.g.*, *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978); *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976);

[11] In this case, the government stands to lose a not insignificant amount of money. More important, the court of appeals' decision will force a new American oil tanker to sit idly by while its shipyard ceases operations and needed Alaskan oil remains in the pipeline awaiting shipment.

Pauls v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). See also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3914, at 550-553 (1976).

The facts of this case indicate why remand orders are not generally "final". The district court's order of November 22, 1977, remanded this case to the Secretary for consideration of the effect of her decision on the existing transporters of Alaskan oil (Pet. App. 90a-95a; R. 245-A to 245-B).[12] Had the Secretary concluded on remand that the economic consequences of allowing the STUYVESANT to enter the domestic trade dictated a different course of action,

[12] The court's order of November 30, 1977, which was entered prior to the administrative hearings and decision on remand, did not terminate the order of remand. Rather, it purported to make its order of remand, which was based on cross-motions for summary judgment, "final" under Fed. R. Civ. P. 54(b). Rule 54(b) allows a court to enter a final judgment on behalf of a party whose liability has been finally determined in a multiple-person suit that is otherwise not final. Here, in contrast, all parties participated in the remand proceedings. No party's claims were completely determined. Moreover, because there was only one request for relief in the case—for cancellation of the Secretary's decision—no claim for relief has been finally determined for all parties. Nor is this a situation in which one party raises several distinct and unrelated claims, less than all of which have been finally determined. There was thus no basis for invoking Rule 54(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). And a district court's erroneous Rule 54(b) certification is not effective to create appellate jurisdiction. *Ibid.*

plaintiffs would have received the relief they sought. They would have had no basis for an appeal. The Secretary's finding on remand that the STUYVESANT decision had no discernible effect on the plaintiffs strongly suggests another problem—that the plaintiffs lack standing to bring this suit. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975). This issue, too, the district court should address in the first instance.[13] The plaintiffs were not even aggrieved by the remand, because that might have led to the relief they wanted. Accordingly, this case is in the same position as is any other case in which a plaintiff attempts to appeal from the denial of summary judgment or from an order granting remand to an agency for further proceedings: until the case comes to a close, there is no appealable order.[14]

[13] It is also arguable that the plaintiffs do not fall within the "zone of interest" protected by Section 506. See *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970). Section 506 protects domestic shipping from excessive competition with vessels that enjoy the advantage of CDS financing. The STUYVESANT no longer enjoys CDS financing, however, and nothing in Section 506 protects existing domestic shipping from additional unsubsidized competition.

[14] The district court's order granting partial summary judgment on the issue of the Secretary's power to terminate a Section 506 restriction cannot fairly be described as a collateral order within the meaning of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Section 506 issue is inextricably involved in the merits of this case, and

Because there is not yet a final order, the court of appeals lacked jurisdiction under Section 1291. The court could have had jurisdiction over this interlocutory order under 28 U.S.C. 1292(b), but there was no certification under that statute. That statute requires that the district court specially certify the question to be reviewed and that, within ten days of the certification, the parties ask the court of appeals to exercise its discretion to permit the interlocutory appeal. Neither occurred here.[15] Therefore the court of appeals had no jurisdiction to decide this case on the merits. Because the court of appeals resolved an important issue without jurisdiction to do so, the Court should grant the petition and summarily vacate the judgment.[16]

2. The court of appeals' decision on the merits is incorrect. Section 207 of the Act unequivocally empowers the Secretary and her delegates to "enter into such contracts, upon behalf of the United States, * * * as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect,

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the court of appeals could review that decision effectively on appeal from the final judgment. See *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468-469.

[15] See also note 12, *supra,* discussing the Rule 54(b) certification. An ineffective Rule 54(b) certificate is not an adequate substitute for a Section 1292(b) certificate. See *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 745.

[16] The government raised this jurisdictional issue for the first time in footnote 4 of its petition for rehearing. Because it is jurisdictional, it may be raised at any time. See *Liberty Mutual Insurance Co.* v. *Wetzel, supra.*

preserve or improve the collateral held by the [government] to secure indebtedness * * *." 46 U.S.C. 1117. See also Section 504 of the Act, 46 U.S.C. 1154 (giving the Secretary discretion to evaluate and approve or disprove CDS contracts). These expansive grants of authority are enough to support the Secretary's decision where, as here, the Secretary has found that the repayment and lifting of the domestic traffic restriction will improve the security of the government's loans and guarantees, will foster both an active merchant marine and a domestic ship building capacity, and will not harm the domestic fleet. See H.R. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

Nothing in the statute explicitly bars what the Secretary did here. The court of appeals concluded that Section 506 implicitly limits the Secretary's power by authorizing temporary waivers of the domestic trade restrictions that do not exceed six months in any year. This unquestionably means that the Secretary cannot allow a subsidized vessel to ply the domestic trade for seven months. But Section 506 does not mention or even hint at the proper rule when a vessel has completely repaid the subsidy. The STUYVESANT transaction is different in kind from that governed by the six-month exception contained in Section 506. When a ship that has received and retained CDS money operates temporarily in the domestic trade, it has a substantial financial advantage over its domestic competitors. (To some extent the mandatory repayment of a pro rata portion of the CDS neutralizes

this advantage. See 46 U.S.C. 1156. Nonetheless the temporarily transferred CDS ship continues to have a significant advantage attributable to its overall smaller amount of indebtedness.) Section 506 means that a vessel cannot enjoy this advantage over the competition for more than six months per year. The STUYVESANT, however, has disgorged its entire CDS. It therefore retains no financial edge over its competitors in the domestic market.[17] In other words, at the moment that petitioners repaid the CDS in full, it was as if they had built the STUYVESANT without a CDS. And nothing in either the logic or language of Section 506 suggests that Congress intended to prohibit increased competition among unsubsidized ships operating in the domestic trade.

Moreover, the legislative history of Section 506 indicates that the court of appeals has misconstrued the import of that provision. The original version of Section 506 permitted the Secretary permanently to relieve a subsidized vessel of its restrictions. See Act of June 29, 1936, ch. 858, Section 506, 49 Stat.

[17] Petitioners did get the advantage of interest-free money in the years between 1972 and 1977. The Secretary will seek to recover a reasonable amount of interest on the CDS for that period of time.

The plaintiffs' suggestion that petitioners were able to speculate at the government's expense is hyperbole. Since 1936 the Secretary has arranged for the permanent release of Section 506 restrictions on only two occasions. It is thus most unlikely that petitioners would have participated in the CDS program on the assumption that they could contract for a permanent release on a moment's notice. Their application might well have been denied.

1999.[18] Furthermore, the reports and debates confirm that Congress intended to permit the Secretary to undo a CDS transaction on repayment of that portion of the CDS "as the remaining economic life of the vessel bears to its entire economic life." See H.R. Rep. No. 1277, *supra*, at 22; S. Rep. No. 898, 74th Cong., 1st Sess. 44 (1935); *Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110, and S. 4111 Before the Senate Comm. on Commerce*, 74th Cong., 2d Sess. 57-58, 124, 133 (1936); *Amending the Merchant Marine Act, 1936: Hearings on S.*

[18] Section 506 then provided (emphasis supplied):

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid* (excluding cost of national-defense features as hereinbefore provided), *as the remaining economic life of the vessel bears to its entire economic life.* If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer. * * *

3078 Before the Senate Comm. on Commerce, Education and Labor, 75th Cong., 2d Sess. 44 (1937).

The amendment of Section 506 in 1938 produced, insofar as is relevant here, the current version of that statute. As the court of appeals noted, this amendment resulted in the deletion of the full repayment language that had appeared in the original Section 506. The court's further conclusion that the change in language reflected a purposeful intent to limit the Secretary's power is unwarranted, however. The House Report accompanying the amendment makes clear that the deletion was inadvertent, and that "[n]o fundamental change in the original purpose of the section has been affected." H.R. Rep. No. 2168, *supra*, at 21. By rewriting the statute Congress merely sought to clarify that temporary as well as permanent waivers of domestic trade restrictions require a pro rata repayment of the CDS. *Ibid.* Moreover, the same report confirmed that Section 207 gave "the Maritime Commission * * * all the general and implied powers of a business corporation." *Id.* at 17.

Finally, the court of appeals' decision fails to give sufficient deference to the Secretary's consistent, albeit rarely invoked, construction of the statute. See generally *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In 1964 the Comptroller General rendered an opinion concurring in the Secretary's position on permanent releases. Decision No. B-155039, 44 Comp. Gen. 180 (1964). In 1972 Congress amended Section 1104(a)

of the Act to provide, *inter alia*, that the Secretary may guarantee private "financing [that aids in] the repayment to the United States of any amount of construction-differential subsidy * * *." See Pub. L. No. 92-507, 86 Stat. 911. 46 U.S.C. 1274(a)(3). The House Report notes that on one prior occasion the Secretary accepted full repayment and released the domestic trade restrictions; the Report then states that the new section authorizes the Secretary to guarantee the repayment of the CDS in that as well as other situations. See H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 9-10 (1971). See also S. Rep. No. 95-1528, 95th Cong., 2d Sess. 2 (1978). This amounts to ratification of the Secretary's construction of the Act, and the court of appeals should have followed Congress' view of its own law. See *Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be vacated summarily because that court lacked jurisdiction. If the court does not summarily vacate the judgment, it should set the case for plenary review.

Respectfully submitted.

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MAY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294197 396